151 U.S. 324

RECORD, CASE No. 14,938.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 680.

F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, AND W. H. COWGILL, PLAINTIFFS IN ERROR,

vs.

CHARLES HECHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 8, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 5, 1893.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1891.

Be it remembered that on the 14th day of October, 1890, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, and W. H. COWGILL, Def'ts.

Petition.

Comes now the plaintiff and shows to the court that he is a resident and citizen of the State of Wyoming; that the defendants F. D. Maynard, D. J. Maynard, and E. A. Allen are residents and citizens of Saline county and the State of Nebraska; that the defendant The Saline County Nurseries is a corporation organized and doing business under the laws of the State of Nebraska, with its principal place of business at Western, Saline county, Nebraska, and is a resident and citizen of Nebraska; that the defendant W. H. Cowgill is a citizen of the State of Nebraska and resides at Holdrege, Nebraska; that the amount in controversy in this suit exceeds the sum and value of $2,000, exclusive of interest and costs; and, for cause of action, the plaintiff says that on and prior to the 30th day of January, 1890, the defendant The Saline County Nurseries was owner of the west half of the southeast quarter and the southeast quarter of the southeast quarter, all in section No. 5, and the
2 southwest quarter of southwest quarter, in section No. 4, all in town. No. 3 north, of range No. 32 west, of the 6th P. M., in Hitchcock county, Nebraska.

II. That the defendants F. D. Maynard, D. J. Maynard, and E. A. Allen were on the 30th day of January, 1890, officers of the defendant The Saline County Nurseries, and the defendant W. H. Cowgill was an agent of the defendant The Saline County Nurseries; that on the 30th day of January, 1890, the defendant The Saline County Nurseries being desirous of selling said property to this plaintiff and to induce the plaintiff to purchase the same, the said defendant, The Saline County Nurseries, and the defendants F. D. Maynard, D. J. Maynard, and E. A. Allen, its officers, and the defendant W. H. Cowgill, their agent, each and all of them made the following false and fraudulent representations in writing concerning said premises, to wit: That said farm "lies four and one-half miles

northwest of Culbertson and about one mile from the Frenchman river and two miles from Beverly, a new town on the Frenchman-river branch of the B. & M.;" that. "as to the lay of the land, it is like most of the land near the stream in that section. Part of it is a little rough. About one hundred acres are fit for cultivation. The balance is fine pasture land, as the grass in the bottom draws grows very high and is fine feed for stock. * * * There are thirty acres under cultivation now; had a fine crop of corn on it last year. * * * It is a desirable piece of land."

III. The plaintiff, relying upon and confiding in said representations of the several defendants, purchased said premises and paid therefore the sum of $1,800.

IV. The plaintiff further says that said representations were false and fraudulent; that there was not to exceed five acres of said land under cultivation; that there was not to exceed twenty-five acres of said land that it was possible to cultivate; that the rest and
3 residue was not fine pasture land; that said land was not a desirable piece of land, but, on the contrary, was and is entirely worthless and of no value; that the plaintiff at the time the defendants made the said representations and at the time of the purchase of the said premises had never seen said premises, which the defendants and each of them well knew and knew that this plaintiff was purchasing said premises in full reliance upon the representations made by said defendants.

V. That this plaintiff did not discover that said representations were false and fraudulent until the month of June, 1890.

That thereupon and during the month of July, 1890, this plaintiff, together with his wife, executed a deed of said land running to the defendant The Saline County Nurseries and notified said defendants The Saline County Nurseries that he held said deed of reconveyance, subject to the order of said defendant The Saline County Nurseries.

That on or about the 24 day of September, 1890, this plaintiff made a formal tender of said deed so executed by himself and wife, covering said premises, to the defendant The Saline County Nurseries, which the said defendant refused to receive at the hands of this plaintiff.

VI. This plaintiff says by reason of the premises he has been damaged in the sum of $2,500, together with interest thereon from the 30th day of January, 1890. The plaintiff herewith brings into court a deed covering said premises, executed by himself and wife and running to the defendants The Saline County Nurseries, as a formal tender of reconveyance of said premises; also brings into court the promissory note of said defendant The Saline County Nurseries in the sum of $599.50, bearing date June 27th, 1890, and signed by the defendant The Saline County Nurseries, which was given to this plaintiff by the defendant at the time of said conveyance as an i-demnity in said sum against a mortgage covering said premises in the amount of said note, which the said Saline County nurseries at the time of the transfer of said premises to this plain-

tiff had agreed to pay, and which note this plaintiff offered
4 to return at the time of tendering a reconveyance of said land.

Wherefore the plaintiff prays judgment against the defendants in the sum of $2,500, together with interest thereon at the rate of 7 % from the 30th day of January, 1890, and his costs in this behalf sustained.

LAMB, RICKETTS & WILSON.

STATE OF NEBRASKA, } ss:
Lancaster County, }

A. C. Ricketts, being first duly sworn, on his oath says he is one of the duly authorized attorneys of said plaintiff; that said plaintiff is a resident of the State of Wyoming and is now absent from said State of Nebraska; wherefore affiant makes this verification; that affiant has read the foregoing petition and knows the contents thereof and believes the matters and facts therein set forth to be true.

A. C. RICKETTS.

Subscribed in my presence and sworn to before me this 13th day of October, 1890.

[SEAL.] FRED. E. SHEPHERD,
Notary Public.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 149, O. Charles Hecht *vs.* F. D. Maynard *et al.* Petition. Filed Oct. 14, 1890. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'ys for plaintiff.

Thereupon, afterwards, to wit, on the 14th day of October, A. D. 1890, a summons was duly issued in said case and returned and filed October 27th, 1890; which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

5 You are hereby commanded to notify the defendants, F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, that they have been sued by Charles Hecht in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha, Nebraska; that unless they answer by the 17th day of November, A. D. 1890, the petition of the said plaintiff this day filed against them in the clerk's office of said court said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 27th day of Oct., A. D. 1890.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of October, A. D. 1890, and in the 115th year of the Independence of the United States of America.

Attest:

[SEAL.] ELMER D. FRANK, *Clerk.*

Attached to said summons are the returns of the marshal in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14th day of October, 1890, I received this summons, and on the 23rd day of October, 1890, I served the same upon the within-named The Saline County Nurseries, by E. A. Allen, general manager of said nurseries, in Saline county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon, after diligent search being unable to find the president, vice-president, or other chief officers of said nurseries in my district.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By W. B. WHEELER,
Deputy United States Marshal.

6 DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14th day of October, 1890, I received this summons, and on the 20th day of October, 1890, I served the same upon the within-named E. A. Allen, in Saline county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By W. B. WHEELER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14th day of October, 1890, I received this summons, and on the 20th day of October, 1890, I served the same on the within-named defendant, The Saline County Nurseries, in Saline county, State and District of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of business of the said defendants.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By W. B. WHEELER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14th day of October, 1890, I received this summons, and on the 20th day of October, 1890, I

served the same on the within-named defendant, F. D. Maynard, in Saline county, State and District of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of abode of the said defendant, with an adult person and resident in the family of said defendant.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By W. B. WHEELER,
Deputy United States Marshal.

7 DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14th day of October, 1890, I received this summons, and on the 18th day of October, 1890, I served the same upon the within-named D. J. Maynard and W. H. Cowgill, in Phelps county, State and district of Nebraska, by delivering to and leaving with each a certified copy thereof, with all the endorsements thereon.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By W. B. WHEELER,
Deputy United States Marshal.

Upon the back of said summons appear endorsements in words and figures following, to wit: No. 140, doc. O. United States circuit court, district of Nebraska. Charles Hecht *vs.* F. D. Maynard *et al.* Summons. Amount claimed of the defendants by the plaintiff is $2,500.00, together with interest thereon, at the rate of 7 per cent., from January 30, '90, and for costs of suit. Filed Oct. 27, 1890. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'y- for pl'ff.

Marshal's Costs.

5 copies	1 50
Use of team	1 50
Subsistence	5 00
Service	10 00
R. R. fare	13 10
Total	$31 10

Thereupon, afterwards, to wit, at the January term of said court, on the 12th day of January, 1891, the following proceedings were had and done in said cause, as appears of record on folio 265, Journal "P" of said court, to wit:

CHARLES HECHT
vs.
F. D. MAYNARD *et al.* } 140, O.

On motion of Hastings & McGintie, attorneys for the defendants herein, leave is hereby granted by the court to answer herein by Thursday next.

Thereupon, afterwards, to wit, on the 15th day of January, 1891, answer was filed in said case; which said answer is in words
8 and figures following, to wit:

In the Circuit Court, in and for the District of Nebraska, of the United States.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, The Saline County Nurseries, and W. H. Cowgill, Defendants. } Answer.

Come now the said defendants and for answer to the petition of the said plaintiff herein admit that the said Saline County Nurseries, defendant, is a corporation, incorporated under the laws of the State of Nebraska, and was on or about the 30th day of January, A. D. 1890, the owner of the premises described in the said plaintiff's petition, in Hitchcock county, in the State of Nebraska, and that the said D. J. Maynard and E. F. Maynard are officers of said corporation, and that about the said time said corporation conveyed the said premises to the said plaintiff.

2nd. Defendants, further answering, say that the said premises were so conveyed to the said plaintiff by said corporation in consideration of the sale and transfer to said corporation by the said plaintiff of a lot of horses & ponies, consisting of 22 head, all of which said horses & ponies were by the said plaintiff represented and guaranteed to be sound and reliable work and saddle horses, and the said horses were, as the said plaintiff well knew, procured and purchased by the said corporation for use in the prosecution of its business, and said horses were accepted by the said defendant corporation solely on the said representations and guarantee of the said plaintiff and were by the said defendant company taken to its principal place of business at Western, Nebraska, and were by the said nurseries company fully and fairly tried and proved to
9 be wholly worthless for the purpose for which they were so conveyed to the said company as aforesaid, and the said company was compelled to and did dispose of the said horses and did so to the very best advantage in its power, but only realized therefrom the sum of $383.00 *dollars*, and all of said horses have been so sold and disposed of except ten (10), which are now in the possession of said company but are of no market value whatsoever.

3rd. Defendants, further answering, say that the said horses when so conveyed to the said nurseries company by the said plaintiff were not sound and were not broken to harness and saddle and were wholly unfit for said company's business, as said plaintiff well knew, and all of said horses were, as plaintiff well knew, diseased and enfeebled by the eating of a poisonous weed of the ranges where the said horses had been kept, and were what is known in that region as "locoed" horses, and were of no value whatsoever, as the said plaintiff then and there well knew; yet the said plaintiff, intending

to cheat and defraud the said company, represented the said horses to be sound and fit for said company's business as aforesaid, and, relying wholly on the said plaintiff's said representation, the said company took and received the said horses & ponies.

4th. Said defendants, further answering, deny each and every allegation in said plaintiff's petition not hereinbefore specifically admitted.

SALINE COUNTY NURSERIES ET AL.,
By HASTINGS & McGINTIE,
Attorneys for Defendants.

STATE OF NEBRASKA, } ss:
Saline County, }

William G. Hastings, being first duly sworn, on his oath says that he is attorney for the said Saline County Nurseries, defendant in this cause; that said defendant is a corporation; that he knows the contents of the foregoing answer and the same is true, as he believes.

W. G. HASTINGS.

Subscribed in my presence and sworn to before me this 14th day of January, A. D. 1891.

[SEAL.] J. W. WEHN, JR.,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 140, O. Charles Hecht *vs.* D. J. Maynard *et al.* Answer. Filed Jan. 15, 1891. E. D. Frank, clerk. Hastings & McGintie, att'ys for defendant.

Thereupon, afterwards, to wit, on the 25th day of April, 1891, reply was filed in said case; which said reply is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

CHARLES HECHT, Plaintiff, }
vs. } Reply.
E. D. MAYNARD *et al.*, Def'ts. }

Comes now the plaintiff and for his reply to the defendants' answer filed herein says that he denies each and every allegation of new matter in said answer contained and asks judgment as prayed in his petition.

LAMB, RICKETTS & WILSON,
Att'ys for Plaintiff.

UNITED STATES, } ss:
District of Nebraska, }

H. H. Wilson, being duly sworn, on his oath says that he is one of the duly authorized attorneys of the plaintiff making the foregoing reply; that the plaintiff is now absent from the State of

Nebraska; that affiant has read the foregoing reply, and that the matters and facts therein set forth are true, as he verily believes.

H. H. WILSON.

Subscribed and sworn to before me this 24th day of April, 1891.

H. W. QUAINTANCE,
Notary Public.

11 Upon the back of said reply appear endorsements in words and figures following, to wit: No. 140, O. Charles Hecht, plaintiff, *vs.* E. D. Maynard *et al.*, def'ts. Reply. Filed Apr. 25, 1891. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'ys for plaintiff.

Thereupon, afterwards, to wit, at the May term of said court, on the 26th day of May, 1891, the following proceedings were had and done in said cause, as appears of record on folio 586, Journal "P" of said court, to wit:

CHARLES HECHT
vs.
F. D. MAYNARD *et al.* } Trial. 140, O.

Now, on this day, come the parties hereto, by their attorneys: also come the following-named persons as jurors, to wit: 1, John F. Duncan; 2, Frank Fernandez; 3, W. M. Foster; 4, William Harrier; 5, John Diffley; 6, J. H. Umstead; 7, Alexander Palmer; 8, L. A. Stocks; 9, J. S. Dew; 10, James Anderson; 11, H. L. Seward; 12, John Kemmerling, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence in part, the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow morning.

Thereupon, afterwards, to wit, at the said May term of said court, on the 27th day of May, A. D. 1891, the following proceedings were had and done in said cause, as appears of record on folio 588, Journal "P" of said court, to wit:

CHARLES HECHT
vs.
F. D. MAYNARD *et al.* } Verdict. 140, O.

On this day again come the parties to this action, by their attorneys; also comes the jury empaneled and sworn herein. Said jury, after having heard the remaining evidence, the argument of
12 counsel, and charge of the court, retired to its room, under the charge of a bailiff duly sworn, for deliberation.

And now comes said jury into open court and presents to the court its verdict, which is in the words and figures following, to wit:

"In the Circuit Court of the United States, District of Nebraska.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, and W. H. COWGILL, Defendants.

We, the jury in this cause, being duly impaneled and sworn, do find and say we find for the plaintiff, and assess his damages at the sum of seventeen hundred twenty and no 100 — (1,720.00) against the said defendants.

(S'g'd) LOUIS G. STOCKS, *Foreman.*"

Thereupon, afterwards, to wit, on the 28th day of May, 1891, motion for new trial was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. Allen, The Saline Co. Nurseries, and W. H. Cowgill, Defendants. } Motion for a New Trial.

Come now the said defendants and move the court here to set aside the verdict and for a new trial in the said cause for the reasons following, namely:

13 First. The damages allowed by said verdict are excessive, appearing to have been given under the influence of passion or prejudice.

Second. That the said verdict is not sustained by sufficient evidence.

Third. That the said verdict is contrary to law.

Fourth. That the said verdict is against the weight of the evidence in said cause.

Fifth. That it appears from the evidence produced by the plaintiff that the plaintiff did not rely upon the alleged representations as to the character of the property conveyed to him by the defendant The Saline County Nurseries, but exacted a warranty of the correctness of the said representations, and no proof was made or offered to be made at the trial of said cause that the said warranty and representations were not made in good faith or were known to be false or were fraudulent in fact on the part of any of the said defendants.

Sixth. That no proof was made or offered to be made at the trial of said cause of any demand on the part of the said plaintiff of the return of the consideration for the contract sought to be rescinded or for any part thereof.

Seventh. That the court erred at the trial of the said cause in instructing the jury to return a verdict for the said plaintiff.

F. D. MAYNARD ET AL.,
By HASTINGS & McGINTIE,
Attorneys for Plaintiff.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 140, O. In the district court of the United States. Charles Hecht, plaintiff, *vs.* F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline Co. Nurseries, and W. H. Cowgill, defendants. Motion for a new trial. Filed May 28, 1891. Elmer D. Frank, clerk.

14 Thereupon, afterwards, to wit, on the said 28th day of May, 1891, motion was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE Saline County Nurseries, and W. H. Cowgill, Defendants. } Motion.

Come now the said defendants and move the court here to dismiss the said case, for that:

First. It appears from plaintiff's petition that the said court has no jurisdiction of the said cause for the reason that it sufficiently appears from plaintiff's petition herein that the real amount in controversy is less than the sum of two thousand dollars, exclusive of interest and costs.

Second. That no evidence was introduced at the trial of the said cause tending to prove that the amount in controversy in this action was the sum of two thousand dollars, exclusive of interest and costs.

F. D. MAYNARD ET AL.,
By HASTINGS & McGINTIE,
Attorneys for Defendants.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 140, O. Charles Hecht *vs.* F. D. Maynard *et al.* Motion. Filed May 28, 1891. Elmer D. Frank, clerk. Hastings & McGintie, att'ys for defendants.

Thereupon, afterwards, to wit, at the said May term of said court, on the 10th day of June, 1891, the following proceedings
15 were had and done in said cause, as appears of record on folio 617, Journal "P" of said court, to wit:

CHARLES HECHT
vs.
F. D. MAYNARD *et al.* } 140, O.

This cause comes on to be heard on motion of the defendant to dismiss this action for want of jurisdiction; on consideration whereof the said motion is overruled.

And the cause coming on further for hearing on the motion of the defendants for a new trial, the motion for a new trial is overruled and judgment is ordered on the verdict.

It is thereupon considered and adjudged by the court that the plaintiff have and recover of the said defendants the sum of seventeen hundred and twenty-four dollars and ten cents and his costs, taxed at the sum of $——.

Thereupon, afterwards, to wit, on the 6th day of July, 1891, petition for writ of error was filed in said case; which said petition is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To the honorable justice- of the Supreme Court of the United States:

And now come F. D. Maynard, J. D. Maynard, E. A. Allen, Saline County Nurseries, and W. H. Cowgill, of said district of Nebraska, by W. G. Hastings and E. E. McGintie, their attorneys, and complain that in the records and proceedings and also in the rendition of judgment in a suit between Charles Hecht, plaintiff, and the said F. D. Maynard, J. D. Maynard, E. A. Allen, Saline Co. Nurseries, and W. H. Cowgill, defendants, tried in the circuit court of the United States in and for the said district of Nebraska, at the May, 1891, term thereof, and in which judgment was rendered
16 against them, the said defendants, on the 10th day of June, 1891, and in which the said circuit court had not, as the said F. D. Maynard, J. D. Maynard, E. A. Allen, Saline Co. Nurseries, and W. H. Cowgill aver, any jurisdiction to hear and determine the said cause and render the said final judgment against these who are petitioners, for that the amount in controversy in the said suit was not the amount and value of two thousand dollars, exclusive of interest and costs, manifest error has intervened, to the great damage of the said parties defendant.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the said question of the jurisdiction of the said circuit court to be certified to in said supreme court and the said error to be corrected by the supreme court aforesaid.

W. G. HASTINGS,
E. E. McGINTIE,
Attorneys for Plaintiffs in Error.

C. S. MONTGOMERY, *Of Counsel.*

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 140, O. Charles Hecht *vs.* F. D. Maynard *et al.* Petition for writ of error. Filed Jul- 6, 1891. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 6th day of July, 1891, bond was duly filed in said case; which said bond is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

CHARLES HECHT, Plaintiff,
vs.
F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, and W. H. COWGILL, Defendants.

Bond.

UNITED STATES OF AMERICA, *State of Nebraska,* } *ss:*

Know all men by these presents that we, F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W.
17 H. Cowgill, principals, and F. H. Porter and John W. Lytle and T. J. Chidister and C. H. Kaup, as sureties, are held and firmly bound unto Charles Hecht in the penal sum of four thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and seals this 20th day of June, A. D. 1891.

The conditions of the above obligation *is* such that whereas, on the 10th day of June, A. D. 1891, the said Charles Hecht, by the consideration of the said circuit court of the United States in and for the district of Nebraska, recovered a judgment against the above-bounden F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, defendants, and the said defendants have prosecuted a writ of error to the said circuit court to procure a review of the said judgment and the proceedings had therein in the Supreme Court of the United States:

Now, therefore, if the said plaintiffs in error shall prosecute their said writ of error to effect without unnecessary delay and if they fail to make their plea good shall answer the damages and costs, then this obligation shall be null and void, but otherwise the same shall be of full force and effect.

D. J. MAYNARD.
E. A. ALLEN.
F. D. MAYNARD.
SALINE CO. NURSERIES,
By E. A. ALLEN, *Manager.*
W. H. COWGILL.
F. H. PORTER.
T. J. CHIDISTER.
C. H. KAUP.

UNITED STATES OF AMERICA, } ss:
State of Nebraska, Saline County, }

Be it remembered that on this 23rd day of June, A. D. 1891, and before the undersigned, a notary public, duly commissioned and qualified and empowered to administer oaths in and for the said county, personally come the above-named John W. Lytle and
18 T. J. Chidister and C. H. Kaup, to me known to be the identical persons who sign- the foregoing bond as obligators, and each severally swear that he is worth in real and personal property, subject to execution within the State of Nebraska, the amounts following, to wit: John W. Lytle, $5,000; T. J. Chidister, $4,000.00; C. H. Kaup, $8,000.

JOHN W. LYTLE.
T. J. CHIDISTER.
C. H. KAUP.

Subscribed in my presence and sworn to before me this 20th day of June, A. D. 1891.

[SEAL.] W. S. GRAFTON.

UNITED STATES OF AMERICA, } ss:
State of Nebraska, Phelps County, }

Be it remembered that on this 22nd day of June, A. D. 1891, and before the undersigned, a notary public duly commissioned and qualified and empowered to administer oaths in and for the said county, personally came the above-named F. H. Porter, to me known to be the identical person who signed foregoing bond as one of the obligators, and swear- that he is worth, in real and personal property subject to execution within the State of Nebraska, the sum of ($2,000) two thousand dollars.

F. H. PORTER.

Subscribed in my presence and sworn to before me this 22nd day of June, A. D. 1891.

[SEAL.] J. ALFRED SNYDER,
Notary Public.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 140, O. Charles Hecht *vs.* F. D. Maynard *et al.* Bond. Filed Jul- 6, 1891. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 6th day of July, 1891, assignments of error *was* filed in said case; which said assignments of error *is* in words and figures following, to wit:

19 *Assignments of Error.*

In the Supreme Court of the United States.

F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, SALINE COUNTY NURSERIES, and W. H. COWGILL, Plaintiffs in Error,
vs.
CHARLES HECHT, Defendant in Error.

Come now the said F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline Co. Nurseries, and W. H. Cowgill, plaintiffs in error, and say that heretofore, to wit, on the 10th day of June, A. D. 1891, the said Charles Hecht, defendant in error in a certain action then pending in the circuit court of the United States in and for the district of Nebraska, wherein the said Charles Hecht was plaintiff and the said F. D. Maynard, D. J. Maynard, E. A. Allen, Saline County Nurseries, and W. H. Cowgill were defendants, recovered a judgment for the sum of seventeen hundred twenty dollars ($1,720.00) and the costs of the said action, taxed at the sum of $—, and a true copy of the record of the said judgment and of the pleadings and proceedings in the said action is hereto attached and made a part hereof; and the said F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, plaintiffs in error, further say that there is error in the said record and proceedings in this, to wit:

1st. That the said circuit court had no jurisdiction in the said cause, for that the matter in dispute in the said cause, as shown by the said record, did not and does not exceed, exclusive of interest and costs, the sum of value of two thousand dollars ($2,000.00).

2nd. That the said circuit court erred in overruling the motion of the said F. D. Maynard, D. J. Maynard, E. A. Allen, Saline County Nurseries, and W. H. Cowgill, plaintiffs in error, to dismiss the said action for want of jurisdiction on the part of said
20 circuit court; which said motion was filed in the said circuit court on the 28th day of May, A. D. 1891.

3rd. That the said circuit court erred in entering any judgment in the said cause, for that no affirmative relief was ever asked for in the said action by these plaintiffs in error, and the declaration of the said defendant in error in said action shows that the amount in dispute in the said action, and for which alone the said defendant in error could recover judgment upon his said declaration, is the sum of eighteen hundred dollars ($1,800), with interest and costs, and no more.

4th. That the said circuit court erred in entering said judgment or any judgment in the said cause, for that no evidence was offered or would have been admissible at the trial of the said cause tending to show that the said matter in dispute exceeded the sum of eighteen hundred dollars ($1,800.00) and interest and costs.

Wherefore said plaintiffs in error pray that the said judgment may be set aside and reversed and the said cause wholly dismissed

because of such entire lack of jurisdiction therein on the part of the said circuit court.

F. D. MAYNARD,
D. J. MAYNARD,
E. A. ALLEN,
SALINE COUNTY NURSERIES, AND
W. H. COWGILL, *Plaintiffs in Error,*
By HASTINGS & McGINTIE,
Att'ys for Plffs in Error.

C. S. MONTGOMERY,
Of Counsel.

Upon the back of said assignments of error appear endorsements in words and figures following, to wit: No. 140, O. F. D. Maynard, D. J. Maynard, E. A. Allen, Saline Co. Nurseries, and W. H. Cowgill, plaintiffs in error, *vs.* Charles Hecht, defendant in error. Assignments of error. Filed Jul- 6, 1891. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 16th day of November, 1891, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals thereof:

21 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, plaintiff-, and Charles Hecht, defendant, a manifest error hath happened, to the great damage of the said plaintiffs in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 16 *Nov.* day of November, 1891.

E. D. FRANK, *Clerk.*

Allowed by the undersigned this 16 Nov., 1891, the same having been presented to me this day for allowance and signature.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 140, O. United States circuit court, district of Nebraska. Chas. Hecht *vs.* F. D. Maynard *et al.* Writ of error. Filed Nov. 16, 1891. E. D. Frank, clerk.

22 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Charles Hecht, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein F. D. Maynard, D. J. Maynard, E. A. Allen, *E. A. Allen,* The Saline County Nurseries, and W. H. Cowgill are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 16th day of November, 1891.

This citation was presented to me for signature this 16 Nov., 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

I hereby solemnly swear that the return made on the attached writ is true and correct.

WEB. B. WHEELER.

Subscribed and sworn to before me this 21st day of November, 1891.

[Notarial Seal Chas. W. Lyon, Douglas County, Nebraska.]

CHAS. W. LYON,
Notary Public.

Commission expires July 8, 1895.

[Endorsed:] Filed Nov. 23, 1891. Elmer D. Frank, clerk.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 21st day of Nov., 1891, I received this citation, and on the 21st day of Nov., 1891, I served the same on Lamb, Ricketts and Wilson, attorneys of record of Charles Hecht, in Lancaster county, State and district of Nebraska, by de-

livering to and leaving with W. J. Lamb a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By WEB. B. WHEELER,
Deputy United States Marshal.

[Endorsed:] Filed Nov. 23, 1891. Elmer D. Frank, clerk.

Marshal's Costs.

Service	2 00
R. R. fare	3 30
Copy	50
Subsistance	1 00
Total	$6 80

[Endorsed:] No. 140, O. United States circuit court, district of Nebraska. Chas. Hecht *vs.* F. D. Maynard *et al.* Citation. Filed Nov. 23, 1891. Elmer D. Frank, clerk.

23 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 23, contain true and faithful transcripts of the pleadings, process, and proceedings of record and on file in my office as said clerk in the case of Charles Hecht, plaintiff, *vs.* F. D. Maynard *et al.*, and that copies of the writ of error and citation have been lodged and remain in my said office.

Witness my hand and the seal of said court, at Omaha, this 27th day of November, A. D. 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

24 In the Supreme Court of the United States.

F. D. MAYNARD, D. J. MAYNARD, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, Plaintiffs in Error,
vs.
CHARLES HECHT, Defendant in Error.
} Assignment of Errors.

Come now F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, and W. H. Cowgill, the said plaintiffs in error, and say that heretofore, to wit, on the 10th day of June, 1891, the said Charles Hecht, the defendant in error in a certain action then pending in the circuit court of the United States in and for the district of Nebraska, wherein the said defendant in error was plaintiff and the said plaintiffs in error were defendants, recovered a

judgment against the plaintiffs in error for the sum of $1,720.00 and the costs of said action, taxed at the sum of $—; that a true copy of the record of the said judgment and of the pleadings and proceedings in said action is herewith filed and reference is hereby made thereto, and the said plaintiffs in error hereby charge and say that there is error in the said records and proceedings and in the rendition of said judgment, for the following reasons, namely:

First. The said circuit court had no jurisdiction of the said cause for the reason that the matter in dispute therein, as shown by the said record, did not and does not exceed, exclusive of interest and costs, the sum or value of $2,000.00.

Second. Because the said circuit court erred in overruling the motion of the plaintiffs in error to dismiss the said action for want of jurisdiction on the part of the said circuit court, pursuant to such motion, which was filed in such circuit court on the 28th day of May, A. D. 1891.

25 Third. In said circuit court these plaintiffs in error asked no affirmative relief. The petition of the said defendant in error in said action shows that the amount in dispute in said action and for which alone the said defendant in error could under any circumstances recover judgment is and was the sum only of $1,800.00, exclusive of interest and costs. Therefore the said circuit court erred in trying said cause and in entering judgment therein against the plaintiffs in error.

Fourth. The said circuit court erred in entering judgment against the plaintiffs in error in said cause, for the reason that no evidence was admissable or offered at the trial of said cause tending to show that the matter in dispute exceeded the sum of $1,800.00, exclusive of interest and costs.

Wherefore the said plaintiffs in error pray that the said judgment may be set aside and reversed, and that the said cause may be dismissed for want of jurisdiction on the part of the said circuit court, and for such other or further relief as the plaintiffs in error may be entitled to.

C. S. MONTGOMERY AND
HASTINGS & McGINTIE,
Attorneys for Plaintiffs in Error.

C. S. MONTGOMERY, *Of Counsel.*

[Endorsed:] Docket —, No. —. In the Supreme Court of the United States. F. D. Maynard *et al.*, plaintiffs in error, *vs.* Charles Hecht, defendant in error. Assignment of errors. Montgomery, Charlton & Hall, attorneys for plaintiffs in error.

Endorsed on cover: Case No. 14,938. Nebraska C. C. U. S. Term No., 680. F. D. Maynard, D. J. Maynard, E. A. Allen, The Saline County Nurseries, & W. H. Cowgill, plaintiffs in error, *vs.* Charles Hecht. Filed December 8th, 1891.

Office Supreme Court U. S.
FILED.
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

F. D. MAYNARD ET AL.,
PLAINTIFFS IN ERROR,
v.
CHARLES HECHT,
DEFENDANT IN ERROR.

No. 680.

Motion to dismiss or affirm.

In error to the Circuit Court of the United States for the District of Nebraska.

BRIEF IN SUPPORT OF THE MOTION.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
W. H. SMITH,
C. W. HOLCOMB,
Att'ys for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

F. B. MAYNARD ET AL.

v.

CHARLES HECHT.

No. 680.

MOTION TO DISMISS OR AFFIRM.

Now comes the said defendant and moves the Court to dismiss the writ of error in this case for the reason that the question of jurisdiction did not properly arise in the court below, and there is no certificate of the question having arisen in said court; or to affirm on the ground that it is manifest that the writ of error was sued out for delay merely, and that the question of jurisdiction is so frivolous as not to need argument.

HENRY H. WILSON,
WALTER H. SMITH,
C. W. HOLCOMB,
Attys. for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, AND W. H. COWGILL,
PLAINTIFFS IN ERROR.

v.

CHARLES HECHT,
DEFENDANT IN ERROR.

No. 680.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

This is a motion to dismiss the writ of error or to affirm the judgment of the circuit court, for the reason that the court is without jurisdiction, because no sufficient *certificate* of a question *of jurisdiction is* in the record; and the facts upon which the jurisdiction of the circuit court depends appear on the record itself, which contains but eighteen pages in all.

On October 14, 1890, Hecht filed his petition in the circuit court against the plaintiffs in error, alleging that he was damaged in the sum of $2,500.00 by the deceit and

fraud of the plaintiffs in error in the sale to him of certain real estate.

On January 15, 1891, the plaintiffs in error answered denying the allegations of the petition, and alleging that the purchase price of the land was paid in horses which Hecht guaranteed to be sound, but which were, in fact, worthless.

On the 25th day of April, 1891, Hecht filed a reply consisting of a general denial.

On May 27, 1891, a verdict was returned in favor of Hecht for $1,720 damages.

On May 28, 1891, the plaintiffs in error filed the following motion: "Come now the said defendants and move the court here to dismiss the said case, for that:

"*First.* It appears from plaintiffs' petition that the said court has no jurisdiction of the said cause for the reason that it sufficiently appears from plaintiffs' petition herein that the real amount in controversy is less than the sum of two thousand dollars, exclusive of interest and costs.

"*Second.* That no evidence was introduced at the trial of the said cause tending to prove that the amount in controversy in this action was the sum of two thousand dollars, exclusive of interest and costs."

On June 10, 1891, this motion was overruled and judgment entered on the verdict.

On November 16, 1891, a writ of error was allowed which seeks to bring the whole case to this Court for review. No objection, it will be seen, was made to the jurisdiction of the circuit court until after the trial was had and verdict found. Such objection should have been made at the first opportunity. A party should not be allowed to gamble on his chances for a favorable verdict, and then object to the jurisdiction of the court when unsuccessful.

De Putron *v.* Young, 134 U. S. 241.

This appeal cannot be entertained by force of any legislation prior to March 3, 1891.

The final judgment in this cause was entered on June 10, 1891, and the writ of error was not allowed until November 16, 1891. The joint resolution of March 3, 1891, preserved the right of appeal to this Court under former legislation only in cases where the appeal was taken or writ of error allowed prior to July 1, 1891. It is therefore clear that the jurisdiction of this Court in this case cannot be founded on legislation existing prior to March 3, 1891.

Wauton *v.* DeWolf, 142 U. S. 138.

Cincinnati Safe & Lock Co. *v.* Grand Rapids Safety Deposit Co., 146 U. S. 54.

National Exchange Bank *v* Peters, 144 U. S. 570.

It follows that the jurisdiction of this Court in this case must be determined solely by the act of March 3, 1891.

No Jurisdiction under Act of March 3, 1891.

This Court has no direct appellate jurisdiction over the judgments of the circuit court except in the six classes of cases enumerated in section 5 of the act of March 3, 1891.

Bank *v.* Peters, 144 U. S. 570.

Of the six classes of cases in which direct appeals are allowed the first class alone can by any possibility apply to a case like that at bar.

Insufficiency of Certificate.

If it be claimed that this writ of error is founded on the 1st subdivision of section 5 of the act of March 3, 1891, then the case should be dismissed because of the

insufficiency of the certificate to present a question of jurisdiction. The language of the act is: "In any case in which the judisdiction of the court is in issue; in such cases *the question of jurisdiction alone shall be certified to* the Supreme Court from the court below for decision." This act does not provide for an appeal to the court upon the whole record of the court below, but for an appeal upon *the question of jurisdiction alone*, and this *question* and not the whole record must be certified to this Court for its decision. Neither can it be said that the assignments of error in this record show that only a question of jurisdiction is raised. The law provided that the *question of jurisdiction* shall be *certified*, and certainly counsel have no authority *to certify* or to dispense with a certificate of the *question* presented to this Court by limiting their assignments of error. The court alone has power to certify and certificate must present to this Court the particular *question* of jurisdiction, and it is not sufficient to certify the whole record to this Court. There is nothing in the writ of error or citation signed by either the judge or the clerk to show that there is or ever was any question of jurisdiction in this case.

When a *question* is *certified* to this Court for determination, the question so *certified* must present a distinct point clearly and precisely stated, and must not present the whole record, which would require this Court, by searching through the allegations of the pleadings, to discover the *question* involved in the appeal.

Dublin *v.* Milford & Co., 128 U. S. 510.
U. S. *v.* Lacher, 134 U. S. 624.
U. S. *v.* Brewer, 139 U. S. 278.
U. S. *v.* Northway, 120 U. S. 327.

If the language of the act merely restricted this appel-

late power of this Court to questions of jurisdiction, then we admit that this record might perhaps be sufficient to confer such jurisdiction. But the language of the act is that only such *questions* of jurisdiction shall *be certified* to this Court. We contend that by this language Congress intended that the *particular question* involving such jurisdiction shall be presented to this Court, not by the record of the whole case, but by the certificate of the court below, the same as questions were heretofore presented by a certificate of division of opinion. We contend that there is in this record no such *certificate* of a *question* of jurisdiction as was contemplated by the act of Congress, and therefore the case should be dismissed.

Judgment should be Affirmed.

If this Court should be of the opinion that the record in this case is sufficient to give this Court jurisdiction, then we contend that this Court should affirm the judgment under subdivision five of rule six of this Court. If this Court has jurisdiction to determine this case, its inquiry must be limited to the question as to whether or not the circuit court had jurisdiction to hear and determine the issue joined in that court.

The petition alleges diverse citizenship and fraud in the sale of the land therein described, and prays judgment for $2,500 damages. True, the judgment is for $1,720 only, but it is the amount claimed and not the amount recovered that determines the question of jurisdiction.

Gordon *v.* Longert, 16 Peters, 97.

Barry *v.* Edmunds, 116 U. S. 550.

There is no contention that the claim for damages in excess of $2,000 was merely colorable and for the pur-

pose of giving the circuit court jurisdiction. And certainly the court could not say in advance that no recovery in excess of that amount could be had on the petition.

Smith *v.* Greenhow, 109 U. S. 669.

Barry *v.* Edmunds, 116 U. S. 550.

It is alleged in the petition that Hecht paid $1,800 for the land, relying on the false representations of the plaintiffs in error. If this were so, and the jury so found, he would be entitled to the goodness of his bargain and not in his recovery be restricted as a matter of law to the amount of the purchase price. If the land as represented would have been worth twice what he paid for it and was in fact worth less, because it was not as represented, the purchaser could recover the whole of such difference even though it would amount to twice the purchase price.

2 Sutherland on Damages, 423.

The price paid for the land by Hecht is wholly immaterial, and the measure of his recovery is the difference between the real value of the land and what would have been its value if it had been as falsely represented to be.

Rutan *v.* Ludlam, 29 N. J. L. 398.

The plaintiffs in error contend that the recovery could in no event exceed the purchase price, and this being less than $2,000.00 the court had no jurisdiction. This would not be true even though a defence to a part of the damages claimed appeared on the face of the petition. Even if the petition showed upon its face that there was a perfect and valid defence to all or a part of the damages claimed, this would not affect the amount in dispute or oust the court of jurisdiction.

Upton *v.* McLaughlin, 105 U. S. 640.

Schunk *v.* Molin, Milburn & Stoddard Co., 147 U. S. 500.

If it be contended that the purchase price of $1,800.00 was the limit of our possible recovery, we say that this was one of the questions to be "heard and determined" by the circuit court and the right to "hear and determine" *is jurisdiction.*

From the record of this case it clearly appears that the writ of error in this case was sued out merely for delay and has delayed the enforcement of the judgment of the circuit court, and damages should be added by this Court, as provided by rule 23, and the writ dismissed, or the cause summarily disposed of by an affirmance of the judgment.

Respectfully submitted.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
W. H. SMITH,
C. W. HOLCOMB,
Attorneys for Defendant in Error.

Office Supreme Court U. S.
FILED.
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO. 680.

F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, AND W. H. COWGILL, PLAINTIFFS IN ERROR.

vs.

CHARLES HECHT, DEFENDANT IN ERROR.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR, OPPOSING MOTION TO DISMISS OR AFFIRM.

C. S. MONTGOMERY.
HASTINGS & McGINTIE.
Counsel for Plaintiffs in Error.

LEW. W. RABER, PRINTER, ROOM B, N. Y. LIFE BLDG., OMAHA.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO. 680.

F. D. MAYNARD, D. J. MAYNARD, E. A. ALLEN, THE SALINE COUNTY NURSERIES, AND W. H. COWGILL, PLAINTIFFS IN ERROR.

vs.

CHARLES HECHT, DEFENDANT AN ERROR.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR, OPPOSING MOTION TO DISMISS OR AFFIRM.

Counsel for defendant in error, in their brief, filed in support of their motion to dismiss or affirm, state correctly the dates of the several filings and proceedings mentioned in the brief, and as they appear in the printed record.

On behalf of the plaintiffs in error it is conceded that the only question presented to this Honorable Court is that of the jurisdiction of the Court below to entertain, try and determine the issue presented by the defendant in error in his petition, which is copied in the printed record upon the first three pages thereof. Such question, so far as the record in this court is concerned, was first presented to the Circuit Court by the motion to dismiss (Record, p. 10) copied upon page three of the printed argument of counsel for the defendant in error, which motion was overruled June 10, 1891,

when the judgment complained of was rendered upon the verdict. It was and is claimed that it appeared, from the allegations of the petition, that the issue presented involved a sum or value less than $2,000, exclusive of interest and costs.

The position thus taken was adhered to, and such claim was the sole ground alleged in the petition filed in the Circuit Court for the allowance of the writ of error. (Record, p. 11.) In like manner, the assignments of error (Record, p. 14) presented solely the same question, though stated in several different forms, and the same is true of the assignment of errors (Record, p. 17.) filed with the record in this court. It follows, therefore, that the writ of error allowed by the District Judge presiding at the circuit at the time, was and must be construed as limited, in its scope and effect, to the single question thus presented.

I.

Counsel for defendant in error first complain, in their brief, that the jurisdictional question was presented too late, citing *Deputron vs. Young* in support of such proposition. The case cited does not establish the rule, apparently contended for, that the question of jurisdiction may be waived by delay in its presentation.

In that case diverse citizenship was alleged as the basis of jurisdiction, which allegation was not denied. Under such circumstances it was held that "No question involving the capacity of the parties to litigate in the Federal Courts can be raised before the jury, or treated as within the issues they are empaneled to determine." After the verdict was rendered an effort was made to show that the parties to the suit had been collusively made, or joined, for the purpose of creating a case cognizable under the act of Congress in question. With respect to this matter it was *held* simply that such proceeding "should be taken at the first opportunity" and

that "delay in its presentation will be considered in examining into the grounds upon which it is alleged to rest."

It was not decided that delay in presentation of a jurisdictional question would prevent its consideration, or result in a denial of the right of the party to present such question, if it should appear that, in fact, the Court was without jurisdiction; in other words, it was not, and never has been, held that jurisdiction can be conferred by the laches of a party in the presentation of the question.

II.

The next point urged by opposing counsel in their brief is that there is no sufficient certificate in the record to present to this Court the question of jurisdiction.

This proposition involves the construction by the court, as stated by counsel, of the first subdivision of section 5 of the act of March 3, 1891, quoted in their brief at the top of page 5. In the first place, it should be observed that the language of the statute is universal; it covers all cases. The declaration is that writs of error, or appeals, may be taken to this Court "in any case," which is the same as saying in *all* cases, "in which the jurisdiction of the Court is in issue." Thus far the case at bar is clearly within the provision. Then follows the direction that "in such cases the question of jurisdiction alone shall be certified." What is the leading idea of this provision? Can it be said to be the matter of certification? We think not. It seems very clearly to be, that the question of jurisdiction shall *alone*, in such cases, be presented to the Supreme Court; that is to say, the mere fact, that a question of jurisdiction arises in the court below, which question brings the case within the authority of this court for review, shall not operate to bring the whole case into this court for determination upon all the questions involved, but the appellate power of this court shall be limited to the single question of jurisdiction. We do not believe,

therefore, that it was intended by the use of the word "certified" to indicate that any particular or formal certificate should be signed by the court below to accompany the record to this Court. It is sufficient if the exact question appear clearly in the record, and that the jurisdictional question only is presented. In that event, the writ of error allowed by the court below would seem to be a sufficient certificate. Could a formal certificate add anything beneficial to this court, beyond what is presented by the writ of error based upon the petition and assignment of errors, by which the question at issue is clearly presented and distinctly limited to that of jurisdiction, on the sole ground that the amount or value in controversy was insufficient to confer jurisdiction upon the Circuit Court? Certainly the word "certified" as used, has no special significance, and should not be construed to mean anything more than that the Circuit Court should send to this court for determination the question of jurisdiction only, either by way of a writ of error or an allowance of an appeal, based upon a proper petition and assignment of errors, themselves founded upon a statement of the jurisdictional question to be presented.

Opposing counsel have evidently overlooked the true object of the provision, which, as stated, is to limit the appellate power of this court, in such cases, to jurisdictional questions, having been misled by the use of the word "certified," by reason of the practice formerly in force, providing for a certificate of division, in cases of disagreement between two judges sitting at the circuit upon the same case. In such cases it was required that the question certified should be clearly and definitely stated, otherwise this court would not consider it. That counsel are thus in error appears clearly from the decisions of this court cited by them at the bottom of page 5, in their printed brief. Such decisions were all rendered prior to the passage of the act in question, and have reference to the sufficiency of the certificates of division in such cases presented to this court. They are not even remote authority for the proposition

asserted, to the effect that a formal certificate is necessary in cases like this, where, by the writ of error founded upon the petition and assignment of errors therefor, the distinct question of jurisdiction presented for determination is clearly and precisely indicated.

III.

Upon the argument thus presented, we submit that the motion of defendant in error to dismiss is clearly without foundation and should be overruled. But the defendant in error has presented, in connection with his motion to dismiss, a motion to affirm the judgment of the court below. This brings the action before this court upon its merits. We gladly meet the issue and submit the action to the court for such final disposition as a proper determination of the issue may require.

It is conceded that the question of jurisdiction is not to be determined in view of the amount of the judgment recovered, but that it must depend upon a construction of the petition filed by the defendant in error in the court below, October 14, 1890. We contend that, upon the face of the petition, it appears that the amount in controversy was the sum of $1,800, exclusive of interest and costs, and no more, and that, therefore, the Circuit Court was without jurisdiction over the action. Opposing counsel, at the bottom of page 6 in their brief, assert that "it is the amount claimed and not the amount recovered that determines the question of jurisdiction." They further say that "there is no contention that the claim for damages in excess of $2,000 was merely colorable and for the purpose of giving the Circuit Court jurisdiction."

These statements are both incorrect. While it is true that the amount recovered does not determine the question of jurisdiction, it is, nevertheless, not *always* true that the question is determined by the amount claimed, as will be seen by the proposition, and authorities presented below. Further than this, we do claim that the alle-

gation of damages in the sum of $2,500 was and is merely colorable.

The well established rule is: "Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiffs' demand, must be regarded."

Wilson vs. Daniel, 3 Dall., 401, at 408.

Lee vs. Watson, 1 Wall., 337.

"The sum demanded governs the question of jurisdiction until it appears that it is not the sum in dispute; but when it appears that the sum demanded is not the real sum in dispute, the sum shown, and not the sum demanded, will govern."

Hilton vs. Dickinson, 108 U. S., 166.

Bowman vs. C. & N. W. R. R. Co., 115 U. S., 611.

Barry vs. Edmunds, 116 U. S., 550, at 560.

Under this rule the final question to be determined is whether or not, upon the face of the petition, it appears, as we contend, that the real sum in dispute was $1,800 only, or was it $2,500, as claimed by defendant in error. We present our views as follows:

IV.

It is asserted by opposing counsel in their brief, that the claim presented was the sum of $2,500, damages by reason of the alleged fraud and misrepresentations of the plaintiffs in error. This is clearly incorrect. The allegation of the defendant in error in his petition is that "*By reason of the premises* he has been damaged in the sum of $2,500." But there is not in "the premises" a single allegation of fact indicating one cent of damages, beyond the sum of $1,800 alleged to have been paid by the defendant in error to the plaintiffs in error for the lands in controversy.

Further than this, it should be observed that the action, as stated in the petition, is not for the recovery of damages on account of the fraud and misrepresentation of the plaintiffs in error. We say this because, if such were the action indicated, then the con-

tract of sale between the parties must have been affirmed by the defendant in error and adhered to, whereas, in truth and in fact, the right to recover, as alleged in the petition, is based upon the recision by the defendant in error of the contract of sale. The defendant in error alleges that immediately upon the discovery of the fraud he "together with his wife, executed a deed of said land running to the defendant, The Saline County Nurseries, and notified said defendant, The Saline County Nurseries, that he held said deed of reconveyance, subject to the order of said defendant, The Saline County Nurseries." He further states that he subsequently formally tendered the deed to The Saline County Nurseries, and that the same was refused, and finally he alleges that he "herewith brings into Court a deed covering said premises, executed by himself and wife and running to the defendant, The Saline County Nurseries, as a formal tender of reconveyance of said premises."

In such cases, the measure of damages is the sum paid, with interest, and the foundation of the recovery is the implied contract between the parties that the consideration paid for the property sold shall, upon failure of the contract, be repaid by the seller to the purchaser.

In such cases, a purchaser must elect whether he will retain the property and sue for damages, by reason of the fraud and misrepresentations, or rescind the contract, return the property and recover the consideration.

"An action for damages for the fraud by which the defendant has induced the plaintiff to enter into a contract the fruits of which the plaintiff retains" is inconsistent with "an action based upon recision; the former would treat the contract as binding, while the latter would repudiate it as invalid."

I. Bigelow on Fraud, Chap. III, p. 65.

Bowen vs. Mandeville, 95 N. Y., 237.

Strong vs. Strong, 102 N. Y., 69.

Butler vs. Hildreth, 5 Metcalf, 49.

"It is a general rule that the party defrauded in a bargain may, on discovering the fraud, either rescind the contract and de-

mand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud."

First Edition, Cooley on Torts, 503.
Hamet vs. Letcher, 37 Ohio St., 356.
Fanson vs. Linsley, 20 Kansas, 235.
National Trust Company vs. Gleason, 77 N. Y., 400.
Western Assurance Co. vs. Towle, 5 Wis., 247.
Walker vs. Duncan, 68 Wis., 624.

In this case the defendant in error, according to his own allegations, rescinded the contract, hence the real sum in dispute, by the rule of law, is fixed at $1,800, the consideration paid by the defendant in error to the plaintiffs in error for the lands in controversy. We, therefore, say that the claim for damages in excess of $1,800 was "merely colorable."

The inapplicability of the propositions and authorities presented by opposing counsel, upon page 7 of their brief, clearly appears from what we have stated above, without further comment.

V.

The last expiring effort of the defendant in error, in support of his contention, is contained in the proposition upon page 8 of the brief, that, even if $1,800 was the limit of the possible recovery of the defendant in error, then the question of such limit was one to be "heard and determined" by the Circuit Court, and that the right to "hear and determine *is jurisdiction.*

In a sense that is correct, the Circuit Court did have the right to hear and determine the question of jurisdiction, but the determination by the Circuit Court of such question did not settle it. If, in fact, the court did not have jurisdiction, then its determination should be vacated by this court, because, as this Court has said, if the Circuit Court "act without authority, its judgments and orders

are regarded as nulities. They are not voidable, but simply void."

In re Sawyer, 124 U. S., 200, at 220.

In conclusion, we insist that the action is properly before this Court for determination upon the sole question of the jurisdiction of the Circuit Court, clearly and precisely stated upon the record, and that by virtue of the propositions and authorities above suggested and cited, such jurisdiction did not exist, and hence that the motion of defendant in error to dismiss or affirm, should be overruled, the judgment of the Circuit Court should be reversed and the action remanded to the Circuit Court, with instructions to dismiss the same.

Respectfully submitted,

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